SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 819

SHELDON OWINGS, *Petitioner*,

v.

STATE OF MARYLAND, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

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PETITION FOR WRIT OF CERTIORARI

Sheldon Owings, Petitioner, prays that a Writ of Certiorari issue to renew the judgment of the Court of Special Appeals of Maryland entered January 28, 1970, affirming the conviction as to Indictment No. 140 of the 1969 Docket of the Criminal Court of Baltimore City in the case of Sheldon Owings, Appellant v. State of Maryland, Appellee, September Term, 1969, No. 209.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Special Appeals of Maryland is reported 8 Md. App. 572 and is included as Appendix A to this Petition. The order of the Court of Appeals of Maryland is unreported and is attached as Appendix B hereto.

JURISDICTION

The judgment of the Court of Special Appeals of Maryland sought to be reviewed was filed on January 28, 1970. The Order of the Court of Appeals of Maryland denying the Petition for Writ of Certiorari was entered on May 11, 1970. That a Petition For An Extension of Time To File A Writ of Certiorari to the Supreme Court was granted by the Court to the 8th of October, 1970. The jurisdiction of this Court is invoked under 28 U.S.C.S. 1257(3).

REASONS FOR WRIT

Petitioner, as reasons why the issuance of such a Writ is desirable and in the public interest, asserts:

A. That the Petitioner is entitled to the protection of the Fourth Amendment of the Constitution of the United States and the failure of the Court to protect this right created a constitutional prejudicial error.

(1) In that a person must be properly arrested and that the search of his vehicle must also be proper or the protection of a person is afforded under the Fourth Amendment of the Constitution is being denied to that individual.

STATEMENT OF QUESTIONS PRESENTED

The public interest is the administration of Criminal justice calls for a determination by the Court of the issue presented in this case. The issue is whether or not a constitutional violation contributed to the conviction of the Petitioner in the indictment in which he was charged.

The question presented here is whether the Court of Special Appeals of Maryland denied the Petitioner's rights under the Fourth Amendment of the Constitution of the United States in affirming the conviction on Indictment No. 140 in that the Petitioner's rights were violated because his vehicle was improperly searched and that as a result of the improper search the Petitioner was improperly arrested.

STATEMENT OF THE CASE

Petitioner, Sheldon Owings, was indicted by the Grand Jury of Baltimore City on January 17, 1969, in one indictment charging him with the violation of the narcotic laws. Petitioner was tried before Judge George D. Solter, without a jury, on Indictment No. 140 on May 1, 1969. The Court found the Petitioner guilty and sentenced the Petitioner to a term of four years.

The Petitioner immediately filed an appeal to the Court of Special Appeals of Maryland raising several contentions, one of which was that his vehicle was illegally searched and that he was illegally arrested.

ARGUMENT

I

THE COURT OF SPECIAL APPEALS OF MARYLAND DENIED THE PETITIONER THE PROTECTION OF THE FOURTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES BY AFFIRMING THE LOWER COURT'S DECISION THAT THE SEARCH OF THE PETITIONER'S CAR AND THE ARREST OF THE PETITIONER WAS LEGAL.

The Petitioner in this case claims that his car was illegally searched and that he was illegally arrested. The Petitioner's rights as to the search of his car and his arrest which are protected by the Fourth Amendment of the Constitution of the United States were not protected by the lower Court but that their rulings amounted to a constitutional prejudicial error which resulted in his conviction in this case.

The factual situation in the Petitioner's case which lead to his arrest and the search and seizure of items in his car will be given to the Court briefly.

At Petitioner's trial, Sergeant Tabeling of the Baltimore City Police Department testified that he received some information around 6:00 p.m. on December 28, 1968, to the

effect that a man with a reddish beard and reddish colored hair would come to 11 Elmwood Road around 7:00 p.m. with some narcotic contraband. He was supposed to be driving a light-colored Volkswagon with foreign tags on it. Acting upon the information, the Sergeant went to the location and upon seeing a gray-colored Volkswagon with foreign tags backing out of a driveway went to the vehicle. He informed the driver that he was a policeman and that he intended to search his car for narcotics. He did not have a search warrant at that time. The Sergeant made the search of the car, found some contraband and arrested Owings. After the arrest, Owings was searched and a pair of tweezers and a scale was found upon him.

At the Petitioner's trial, the State introduced the items seized from the Petitioner's car and person into evidence at which time an objection was made as to their admissibility because they were the fruits of an illegal search and seizure and illegal arrest. The Court, after hearing the testimony on this motion, denied the motion to suppress and admitted the items into evidence. As a result of this improper ruling, the Petitioner was found guilty.

Of course, the Petitioner feels that both the arrest and the search and seizure of his car was illegal. To begin with, the officer had no warrant. Nevertheless, the rule of thumb would be necessary as far as his information was concerned would be the same as if he had a warrant. The arrest was only as strong legally as the degree of reliability of his informant. Warrant or no warrant.

The arrest lacked probable cause because the reliability of the informant plus the type of information given by the informer did not meet the standards set out in *Spinelli v. U.S.*, 89 Supreme Court Reporter 587. Here the Court stated:

> "Applying these principals to the present case, we first consider the weight to be given the informer's tip when it is considered apart from the rest of the affidavit. It is clear that a Commissioner could not

credit it without abdicating his constitutional function. Though the affiant swore that his confidant was "reliable," he offered the magistrate no reason in support of this conclusion. Perhaps even more important is the fact that Aguilar's other test has not been satisfied. The tip does not contain a sufficient statement of the underlying circumstances from which the informer concluded that Spinelli was running a bookmaking operation. We are not told how the F.B.I.'s source received his information—it is not alleged that the informant personally observed Spinelli at work or that he ever placed a bet with him. Moreover, if the informant came by the information indirectly, he did not explain why his sources were reliable. Compare *Saben v. U.S.*, 381 U.S. 214 85 S.Ct. 1365, 14 L. Ed. 2d 345 (1965). In the absence of a statement detailing the manner in which the information was gathered, it is especially important that the tip describe the accused's criminal activity in sufficient detail so that the magistrate may know that he is relying in something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation."

Also, in the same opinion, the Court added, at page 587, the following:

"While recognizing that the constitutional requirement of probable cause can be satisfied to hearsay information, this Court held that the affidavit was inadequate for two reasons, first the application failed to set forth any of the underlying circumstances necessary to enable the magistrate independently to judge the validity of the information's conclusion that the narcotics were where he said they were. Secondly, the affiants "—and this has been covered in this case—" the affiants—the affiant officers did not attempt to support their claim that their informant was credible or his information reliable."

In the instant case, the test of the Spinelli case was not met in that the information that the informant had was credible or sufficient.

The search and seizure was illegal because Sgt. Tabeling acted too hastily. He did not secure a warrant to search the car. He had every opportunity to do so. Both Owings and the Volkswagen were under restraint or in the custody of Sgt. Tabeling at the time that the car was stopped. What information or evidence he needed was in the car which he searched, even though he knew from his informer that the contraband would be in the automobile. Owings was already under restraint. The Sergeant could have had the automobile taken to the impounding lot, called in, and had a warrant ready for the search of the car. The search of the car or Owings was not an incident to the arrest because Sgt. Tabeling was relying upon what his informer had given him and nothing else.

Where a warrant is essential it should be gotten. *U.S. v. Kleefeld*, 275 F. Supp. 761.

Along the same principal of the legality of search and seizures, the case of *Glisson v. U.S.*, 406 Fed. 2nd at p. 424 had the following to say:

> "Visual examination of truck did not institute a 'reasonable search' where truck was parked at a truck park at time of search, while Defendant was in jail on an unrelated offense, where opening door to obtain identification number was not an incident to arrest of Defendant, no emergency existed requiring identification number to be immediately obtained, and there appeared to be no danger that evidence would be removed or destroyed, so that it was plain error to permit fruits of such search to be introduced in evidence in Dyer act prosecution, 18 U.S.C.A. Sec. 2312; U.S.C.A. Cont. Amend. 4."

Again, Owings insists that, as a matter of law, that there was no emergency as stated in the above that required an immediate search *without a warrant*.

As a result of the improper action of the police in the searching of the car and person of the Petitioner, he was deprived of the right guaranteed to him by the Fourth

Amendment of the Constitution of the United States which prohibits all unreasonable searches.

CONCLUSION

For the reasons stated above, certiorari should issue to the Court of Special Appeals of Maryland as to Indictment 140 of the 1969 Docket of the Criminal Court of Baltimore City.

Respectfully submitted,

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APPENDIX A

Appellant was convicted at a court trial of having possession and control of marihuana and was sentenced to four years under the jurisdiction of the Department of Correction. On this appeal he contends that as he was illegally arrested, the search of the automobile he was then driving was likewise illegal; and that the admission into evidence of the marihuana seized as a result of that search constituted reversible error.

At the trial Sergeant Steven Tabeling of the Baltimore City Police Department testified that at approximately 6:00 p.m. on December 28, 1968, he received a phone call from an informant, a former drug addict, who had furnished him "information which had led to the arrest and conviction on one subject for the possession of Marihuana and burglary, on two others for possession of Heroin and on two others for possession of Marihuana"; that the informant "had also supplied [him] information that had led to the recoveries of various amounts of drugs"; and that two of the people concerning whom the informant had furnished information "were convicted in this court last week." He further testified that his informant told him "that a man by the name Sheldon Owings, who was a white male, had reddish color hair, had a red beard would come to 11 Elmwood Road at about 7:00 p.m. on the night of the 28th"; that "[i]n his possession he would have two kilos of Marihuana"; that "[h]e would also have approximately one hundred pills of mescaline" (a hallucinogenic drug); that "Owings would be driving a Volkswagen which was light in color and had the appearance of a Volkswagen bus"; and that "it would have foreign tags on it." Tabeling testified that the address in question was about a mile and one half from where he received the call from his informer; that he didn't think he had time to secure a search warrant for the vehicle; that he then went to the location to await the arrival of Owings; and that at about 7:30 p.m. a man later identified as the appellant Owings and having a "reddish color" beard arrived

"driving a gray Volkswagen bus type with a foreign tag on it." Sergeant Tabeling approached the vehicle as it was entering the driveway at 11 Elmwood Drive, where "I identified myself to Mr. Owings and told him that I was going to make a search of his vehicle for narcotics." The vehicle was then searched. Two bricks of marihuana were found in the rear of the vehicle, together with a package of marihuana seeds and a quantity of non-narcotic pills. Appellant was then arrested.

It is well settled that an automobile, unlike a dwelling or person, may be searched without a warrant where there is probable cause in the constitutional sense to believe that the contains that which is subject to seizure, whether it be contraband, the fruits or instrumentalities of a crime, or other evidence thereto pertaining; and the right so to search an automobile, or other movable vehicle, does not depend on whether the searching officer first had probable cause to arrest the driver or other occupant. *Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216; *Johnson v. State*, 8 Md. App. 28; *Cornish v. State*, 6 Md. App. 167; *Sweeting v. State*, 5 Md. App. 623. The rule is justified on the basis that an automobile is so readily movable as to make impracticable the obtaining of a search warrant; and the rule applies to parked vehicles even where no immediate danger exists that the articles to be seized from the vehicle will be removed. *Sweeting v. State*, *supra*, at page 628.

We held in *Johnson v. State*, *supra*, at page 33, that probable cause to conduct a warrantless search of an automobile exists in the constitutional sense when the facts and circumstances within the officer's knowledge, and of which he had reasonably trustworthy information, were such as would warrant a man of reasonable caustion in believing that the vehicle contained that which was lawfully subject to seizure. While a mere suspicion will never suffice to establish probable cause, neither is certainty a requirement. An officer is therefore not required to have actual knowledge that the vehicle harbors the items to be seized at the time he under-

takes his warrantless search. As stated by the Supreme Court in *Spinelli v. United States*, 393 U.S. 410, "only the probability, and not a *prima facie* showing of criminal activity is the standard of probable cause." Where, as here, the legality of the search of appellant's motor vehicle depends upon the existence of probable cause and the information upon which the arresting officer acted in initiating the search was received from an undisclosed informant the rule, more concretely stated, is that probable cause is shown where the informer's information, together with the officer's personal knowledge, are such as show, with specificity, what the informer actually said and why the officer thought the information was credible; and it is further shown that such information was sufficiently reliable and reasonably trustworthy to give the officer, as a prudent man, probable cause to believe that the vehicle contained the fruits or instrumentalities of a crime or other evidence pertaining thereto. *Cornish v. State*, *supra*, and cases cited at page 176. The rule, stated in somewhat different terms, but meaning essentially the same thing, is that where the search of the motor vehicle is initiated on hearsay information received from an informer, the State, to establish its legality where challenged, must sufficiently inform the trial judge of some of the underlying circumstances from which the informant concluded that the vehicle harbored fruits, instrumentalities, or evidence of a crime, and some of the underlying circumstances from which the police concluded that the informant was credible or his information reliable. *See Mullaney v. State*, 5 Md. App. 248, and cases cited at page 254.

Appellant contends that under *Spinelli v. United States*, *supra*, probable cause cannot be established unless the basis for the informer's conclusion that the accused was committing a crime is shown with particularity. He contends in the instant case that there was absolutely no showing of any "underlying circumstances" from which the informer concluded that the appellant was carrying narcotics in his vehicle. *Spinelli* is undoubtedly the Supreme Court's most

recent and definitive case involving the use of information obtained from an informer as a basis for probable cause.[1] While the court there found that a search warrant was not supported by probable cause because, among other reasons, the basis for the informer's tip that the accused was committing a crime was not shown, it reverently reaffirmed its earlier landmark decision in *Draper v. United States*, 358 U.S. 307. In *Draper*, a federal narcotics agent of considerable experience was told by a paid informer that defendant Draper was engaged in narcotics traffic, and that Draper had gone to Chicago on the train and was going to bring back three ounces of heroin on one of two specified dates. The informer also gave the agent a detailed physical description of Draper and of the clothing that he would be wearing, saying that he would be carrying a tan zipper bag and that he habitually walked fast. The informant had given the agent reliable information on several previous occasions regarding narcotic violations. On the second of the specified days, the agent observed the person having the exact physical description and wearing the precise clothing described by the informer "alight from the incoming Chicago train and start walking 'fast' toward the exit. He was carrying a tan zipper bag in his right hand and his left was thrust in his raincoat pocket." The agent stopped Draper, arrested him, then searched him and found two envelopes containing heroin clutched in his left hand in his raincoat pocket and found a syringe in the tan zipper bag. On the basis of what the informer had told the agent and on the agent's corroboration of this information, the court said:

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[1] In *Spinelli*, the Supreme Court said:

> "While *Draper* involved the question whether the police had probable cause for an arrest without a warrant, the analysis required for an answer to this question is basically similar to that demanded of a magistrate when he considers whether a search warrant should issue."

We think it similarly apparent that the principles enunciated in both *Spinelli* and *Draper* control the question whether probable cause has been shown for a vehicle search.

> "* * * [the agent] had personally verified every facet of the information given him by [the informer] except whether petitioner had accomplished his mission and had the three ounces of heroin on his person or in his bag. And surely, with every other bit of [the informer's] information being thus personally verified, [the agent] had 'reasonable grounds' to believe that the remaining unverified bit of [the informer's] information—that Draper would have the heroin with him—was likewise true." 358 U.S. at 313.

The case before us closely parallels *Draper*, except that here a naked vehicle search is involved rather than a search incident to an arrest. As in *Draper*, an obviously reliable informant told Sergeant Tabeling that appellant was going to arrive at a specified place at a specified time by means of a specified mode of transportation and would have in his possession prohibited narcotics of a specified type. As in *Draper*, the appellant's physical appearance was described with particularity such that there could be no mistaking his identification. And, lastly, as in *Draper*, Sergeant Tabeling, prior to his search of appellant's vehicle, personally observed everything that the informant had told him other than that the vehicle contained narcotics. Thus, as in *Draper*, there was probable cause to search appellant's vehicle for narcotics on these facts.

Spinelli and *Draper* would thus seem to involve two different, but constitutionally adequate, tests to determine the sufficiency of an informer's information sought to be used as a basis for probable cause. *Spinelli*, as we pointed out in *Price v. State*, 7 Md. App. 131, would seem to require, in substance, that the informer's tip, to constitute probable cause in a constitutional sense, show, first, "underlying circumstances" such as would enable a magistrate or reviewing court independently to judge the validity of the informer's conclusion that a crime was being committed, or, as here, that evidence thereof was to be found in the automobile of the accused; and, secondly, there be set forth information showing that the informer was "credible," or his informa-

tion "reliable." If the informer's information does not meet these requirements, as postulated in *Spinelli*, then the question is whether, under *Draper* where the reliability of the informer is clearly shown is his information so sufficiently detailed that, when corroborated, it becomes at least as trustworthy as a tip meeting *Spinelli* requirements without independent corroboration. When it is, it becomes apparent, observed the court in *Spinelli*, that the police were relying on something more substantial than casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation; on the contrary, such information is of a sort which, in common experience, may be recognized as having been obtained in a reliable way, so that a judicial officer, when confronted with such detail, could reasonably conclude that probable cause existed in the constitutional sense. *See Frey v. State*, 3 Md. App. 38. Within these principles, we think it clear that even though there was no showing in the instant case how the informer received his information that appellant would be carrying narcotics in his automobile, nevertheless, probable cause was plainly shown under the rationale of *Draper*.

Appellant's further contention that the evidence was insufficient to support the conviction is based on the premise that the articles seized from his vehicle were not properly admissible in evidence at the trial. As we have held otherwise, it is apparent that there was sufficient evidence to support the convictions.

JUDGMENTS AFFIRMED. COSTS TO BE PAID BY APPELLANT.

APPENDIX B

SHELDON SHIPLEY OWINGS	•	IN THE
	•	COURT OF APPEALS
v.	•	OF MARYLAND
	•	Miscellaneous Docket No. 26
STATE OF MARYLAND	•	September Term, 1970
	•	(No. 209 - September Term,
	•	1969 Court of Special
	•	Appeals)

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ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals in the above entitled case, it is

ORDERED by the Court of Appeals of Maryland that the said petition be, and it is hereby, denied.

/s/ Hall Hommond
Chief Judge

Date: May 11, 1970